



Date: May 13, 1999
Case No. 1997-INA-219

In the Matter of:

EL PASO MARKETING, INC.,
d/b/a STAR DOLLAR,
Employer,

on behalf of

SAAD ZAFAR,
Alien.

Appearances: Adan G. Vega, Esquire
Hyejunk Rosa Han, Esquire
For Employer

Certifying Officer: Charlene G. Giles
Dallas, Texas

Before: Lawson, Neusner and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER
AND
ORDER TO SHOW CAUSE

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of Employer's application for alien labor certification.¹ Employer

¹ The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

operates retail outlets, and seeks to fill the position of "Retail District Manager." (AF 130) The job requirements are a high school education, two years of experience in the job offered or as a store manager, and two character references. (AF 130)

I. APPLICANT COWLEY

BACKGROUND

The CO issued a Notice of Findings ("NOF") on December 13, 1996, proposing to deny certification on the ground, *inter alia*, that applicant Kim Cowley was not rejected for lawful job-related reasons in violation of 20 C.F.R. § 656.21(b)(6). (AF 16-18) Specifically, the CO wrote in pertinent part:

Kim Cowley ...: The employer's report of recruitment results state that the applicant lacks the required experience. However, a review of the applicant's resume indicates she has the work experience necessary to qualify for the job opportunity. Furthermore, a follow-up questionnaire returned by the applicant states: "I have called them many times in El Paso & in Houston, but when they would talk to me they were not nice."

Inasmuch as it appears that Ms. Cowley is fully qualified for the job opportunity, it appears that the need for the labor certification for the alien has vanished.

Consequently, the employer must provide documentation to prove, without a doubt, that the recruitment efforts conducted in conjunction with the filing of this application for Alien Labor Certification failed to produce any qualified U.S. Workers.

(AF 18)

Employer submitted a rebuttal dated January 7, 1997. (AF 5-15) Employer wrote to Ms. Cowley asking her to provide contact persons so that it could confirm the managerial experience stated in her resume. (AF 13) Employer provided a certified mail return receipt confirming that Ms. Cowley received this letter, and Employer's attorney stated in a rebuttal letter that Ms. Cowley did not respond. (AF 6)

The CO issued a Final Determination on January 31, 1997, denying certification on the ground, *inter alia*, that Employer's submission of a certified mail return receipt in rebuttal was evidence of a contact of Ms. Cowley "over one year after the initial recruitment period." (AF 4)

DISCUSSION

The ground stated for denying labor certification in the Final Determination in regard to Ms. Cowley is off the point. The fact that Employer attempted to recontact Ms. Cowley after the

NOF in an attempt to obtain additional information is not in itself a ground for denying labor certification.

Nonetheless, the NOF did focus the issue for Employer of whether Ms. Cowley was rejected for lawful, job-related reasons -- specifically noting the issues of the qualifications stated in Ms. Cowley's resume, and her complaint that Employer was difficult to reach and "not nice" on the telephone. Employer had full opportunity to present any rebuttal whether Ms. Cowley was qualified for the job, and second, whether it engaged in good faith recruitment. *Compare Carlos Uy III*, 1997-INA-304 @ 8 (Mar. 3, 1999) (*en banc*) (less than fully reasoned Final Determination will not preclude affirmance of denial of certification if NOF gave adequate notice of violation, and the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded).

In regard to Ms. Cowley's qualifications, although Ms. Cowley's resume clearly indicates qualifying experience in retail management, (AF 234) Employer maintains that she admitted in her interview that she had only worked as a cashier.² Ms Cowley, however, indicated in a questionnaire that she believed she was qualified for the position.

Employer's rebuttal does not directly address Ms. Cowley's statement that she had difficulty reaching Employer for an interview, and was treated rudely when she finally was interviewed over the telephone.

Essentially, this matter resolves to credibility. Review of this record makes us suspect that Employer's manner of contacting and interviewing applicants was not in good faith. Ms. Cowley was not the only applicant to report problems with the contact:

Mr. Rodriguez reported that he was not interviewed; that he "called after they told me to mail resume. No called after that." (AF 23) In the recruitment report, Employer states that Mr. Rodriguez never contacted it. (AF 116)

Mr. Bustillos stated that "I received a certified letter to which I responded to 6 different time but no one ever returned by calls." (AF 25) In the recruitment report, Employer states that Mr. Bustillos never contacted it. (AF 113)

Mr. Medina reported that he "had two interviews scheduled at the same time. Star Dollar as one. I did not have a point of contact to reschedule." (AF 26) In the recruitment report, Employer states that Mr. Medina never contacted it. (AF 111, 117)

²Employer's alternative ground for rejecting Ms. Cowley, that even if she had management experience, it was in clothing retail and therefore disqualifying, is not a lawful, job-related ground for rejection. Employer only required two years of experience in the job offered or as a store manager.

Mr. Davis reported that he “asked for an interview, but it was always – ‘we will call you later.’” He also reported that “I talked to Mr. Sad several times re: the interview mentioned in the letter & always got the runaround ‘Main Office is in Houston – I’ll call you back’ & he never did.” (AF 27) In the recruitment report, Employer indicates that Mr. Davis called twice to schedule an interview, that he was interviewed on a third occasion, but was rejected for lacking retail experience and therefore lacking two years experience as a “sales manager”. (AF 110) We note Mr. Davis’ experience was not directly in retail, but rather was as a self-employed VCR/TV repairman, manager of a three state area of the Salvation Army for about a year-and-a half, and manager of hotels for five years. (AF 145-148)

Ms. Deck reported that “I called Star Dollar and could not understand the person on the phone. I left my name & number but the calls were never returned.” (AF 28) In the recruitment report, Employer states that Ms. Deck never contacted it. (AF 113)

Mr. Dieguez stated that “I always contacted my prospective employer but he was never available. Everytime that I called they told me that they didn’t know anything about the position. In another occasion they wanted me call after 7:00pm.” (AF 29) In the recruitment report, Employer states that Mr. Dieguez never contacted it. (AF 111, 117)

Mr. Lovett stated: “I thought it was very disrespectful when Star Dollar asked me for my Social Security number and/or my resume and didn’t contact me later. I was left hanging.” (AF 33) In the recruitment report, Employer does not state whether it ever spoke with Mr. Lovett, but indicated that Mr. Lovett was rejected based on his resume. (AF 110) Mr. Lovett’s resume in fact does not show any experience as a store manager. (AF 149)

Ms. Marquez stated that she “could never get hold of person, Mr. Shariff? Always out of town.” (AF 35)³ In the recruitment report, Employer states that Ms. Marquez never contacted it. (AF 115)

Mr. Morales indicated that he tried contacting Employer at different locations, that he was given a phone number in San Antonio to contact the Regional Manager for an interview, and was given different dates for interviews that were postponed several times. (AF 37) In the recruitment report, Employer states that Mr. Morales never contacted it. (AF 115, 117)

Of the seventeen applicants whose questionnaire responses are contained in the record, ten reported difficulty contacting Employer and setting up an interview. Thus, Employer’s credibility on this issue is difficult to reconcile with such a high percentage of U.S. applicants reporting such difficulties, and Employer’s denials that many of them ever even contacted it.

³Employer’s President’s name is Sherali Ali. (AF 131)

We also note that Ms. Cowley's resume is explicit about her retail management experience, even describing what she did as a manager. Thus, to believe Employer's story that she admitted to being just a cashier would require us to find that Mr. Cowley falsified her resume. Given that her statement about difficulty contacting Employer is consistent with the experience of nine other applicants, and as discussed below in regard to Employer's lack of credibility about the date of mailing of response letters to applicant Bejarano, we decline to make that finding.

We find that the preponderance of the evidence indicates that Ms. Cowley was not rejected for lawful, job-related reasons because (1) her resume indicates that she was qualified, and Employer's explanation that she admitted in an interview that she was only a cashier is not credible, and (2) Employer did not engage in good faith recruitment when it made it difficult for applicants to arrange for interviews.

II. APPLICANT BEJARANO

BACKGROUND

On February 12, 1996, Employer supplied a recruitment report relating to 40 U.S. applicants, including, *inter alia*, copies of Employer's response letters to the applicants, and an analysis of prospective applicants. (AF 42-236) In the report, Employer stated in regard to applicant Cel Bejarano:

Mr. Bejarano was contacted by certified mail on January 2, 1996. The letter requested that the applicant either send a resume for review or call by telephone to arrange an interview. The letter was received by Mr. Bejarano; however, this applicant did not in any way respond further to the letter. Therefore, Mr. Bejarano is **not able, willing nor qualified** to fulfill the position of ***Retail District Manager***.

(AF 112 emphasis in original) The recruitment report also includes a photocopy of a letter dated January 2, 1996 to Mr. Bejarano from Employer asking that he send Employer his social security number and a resume. (AF 51) A receipt for certified mail number P 398 052 293 appears on the photocopy, and the blank for "Postmark or Date" contains a handwritten notation "1/3/96". (AF 51). Unlike most of the other response letters in the recruitment report, no return receipt is shown. (*Compare* AF 49A to 89A)

The CO issued a Notice of Findings on December 13, 1996, proposing to deny certification on the ground, *inter alia*, that Employer did not prove that it actually mailed a letter to applicant Cel Bejarano as stated in the recruitment report. (AF 16-18). The CO wrote:

The employer's report of recruitment results states that the applicant was contacted by certified mail on January 2, 1996. The employer failed to provide proof of this statement. A receipt for certified mail was submitted with the case documentation; however, the

receipt has not been post marked by the U.S. Postal Service to support that the letter was actually mailed. Consequently, the employer is required to provide proof that the January 2, 1996 certified letter #P3908052317 was actually mailed. This proof should consist of the PS 3811 (green card) for certified mail #P398052317 which was either delivered to the applicant or returned to the employer by the post office marked “undeliverable.”

(AF 17-18)⁴

Employer submitted a rebuttal by letter dated January 7, 1997. (AF 5-15) Employer’s attorney stated that “we still have not received the receipts of the two (2) certified mail sent to [Mr. Bejarano] on January 3, 1996 and February 13, 1996. *Please see Exhibit C.* Since we did not receive the PS 3811 for these two (2) letters, we do not have a method of proving the fact that they were mailed or delivered to him” (AF 5) Employer’s attorney asserted that an attempt to contact Mr. Bejarano by telephone was made after the certified letter was not received, but his number was unlisted. (AF 5) The attorney also noted that soon after the NOF, Employer made another attempt to contact Mr. Bejarano by certified mail, return receipt requested; that this time he responded, stating that he is currently employed and did not wish to pursue the job opportunity with Employer. (AF 5)

The appeal file contains attachments to the rebuttal letter, including a photocopy of a letter dated January 2, 1996 to Mr. Bejarano requesting that the applicant send Employer his social security number and resume. (AF 9) The photocopy also shows a certified mail receipt – number P 398 052 293; included in the blank describing “Postmark or Date” is the handwritten notation “1/3/96.” (AF 9) Another attachment to the rebuttal letter is a photocopy of a letter dated February 13, 1996 from Employer to Mr. Bejarano, stating that it had not received a return receipt, and asking that he contact Employer within five days of receipt of the letter if he still was interested in being considered for the job. (AF 10) This photocopy shows a receipt for certified mail Z 155 027 977; included in the blank describing “Postmark or Date” is the handwritten notation “2/13/96.” (AF 10) Finally, the rebuttal letter includes photocopies of a December 19, 1996 letter from Employer to Mr. Bejarano asking that he call Employer for an interview (AF 11), a receipt showing “Postmark or Date” of 12/19/96, a return receipt signed by Mr. Bejarano (AF 11A), and a note to Employer from Mr. Bejarano stating that “I don’t recall receiving any certified mail from you until now. Sorry you had to wait so long for an answer. I am currently employed as an Engineering Manager....” (AF 12)

The CO issued a Final Determination denying labor certification on January 31, 1997. (AF 3-4) The CO found:

Regarding applicant Bejarano, the employer was requested to present proof of the January

⁴We note that the certified mail number cited by the CO does not precisely match the number contained on Employer’s response letter. This is evidently a typographic error, as in all other respects the CO’s description of the recruitment report is accurate.

1996 certified mailing discussed in the Notice of Findings. In rebuttal of January 7, 1997, the employer presents a certified mail return receipt which was mailed on December 19, 1996 and delivered on December 27, 1996, over one year after the applicant was initially referred to the employer.

The Notice of Findings specifically requested proof of the January 2, 1996 certified mailing. The employer failed to provide such proof. Consequently, it is the determination of this office that since the employer could not prove that the applicant was contacted at the initial time of recruitment, the application is hereby denied.

(AF 4)

Employer, through counsel, requested administrative-judicial review in a letter dated February 14, 1997. (AF 1-2) Employer's counsel stated that "While the employer is not in possession of the return receipts from the [January 2 and February 13, 1996] certified letters, affidavits are attached at this time to verify and attest to the fact that those two (2) letters were indeed sent to the prospective applicant, Cel Bejarano."⁵ (AF 2) Counsel further stated that "For some unknown reason, the receipts of the two (2) letters sent to Cel Bejarano were never returned to the employer and therefore, technically there is no proof of the mailing of the letters. However, good faith should be found on behalf of the employer considering that all of the other numerous applicants were contacted properly and within reasonable time. There is a pattern of the employer's earnest attempts to contact each and every one of the applicants." (AF 2)

On April 17, 1997, Employer filed its brief with this Board. Acknowledging that in its previous correspondence with the Board requesting review of the denial, it was stated that Employer was not in possession of the return receipts, "through a more thorough search, the employer has now found those letters that were undeliverable and returned to the employer." Employer argued that its good faith was exhibited considering that all of the other numerous applicants were allegedly contacted properly and within a reasonable time, and that there was no reason to single out Mr. Bejarano because they did not have his resume to make Employer apprehensive about contacting him. Attached to the brief are, in addition to the photocopies of letters to Mr. Bejarano submitted in the rebuttal, the original letters and envelopes sent to Mr. Bejarano, and returned to Employer unclaimed by the applicant.

DISCUSSION

The CO's Final Determination correctly states that Employer's rebuttal failed to establish that Employer ever actually contacted Mr. Bejarano in January of 1996. Thus, although the CO's discussion of the December 1996 letter was a bit confusing, the main point was that Employer did

⁵No such affidavits are contained in the appeal file.

not successfully establish a contact with Mr. Bejarano during the original recruitment period.

Employer's submission of the original letters and envelopes with its brief on appeal establishes that, in fact, Employer did mail the letters by certified mail and that Mr. Bejarano never claimed them. However, evidence first submitted with the request for review and not in the record upon which the denial was based generally will not be considered by the Board. *See University of Texas at San Antonio*, 88-INA-71 (May. 9, 1988). The same rule applies to evidence submitted with a brief on appeal. *O'Malley Glass & Millwork Co.*, 88-INA-49 (Mar. 13, 1989). Employer's submission of this evidence after requesting review is tantamount to an untimely appeal. Employer's only explanation for this untimely submission of the documentation is that a more thorough search of Employer's records turned them up.

Even assuming such evidence is properly before the Board for its review, however, the evidence only serves to further damage Employer's case.⁶ First, it directly contradicts Employer's statements in the recruitment report that it sent Mr. Bejarano a certified letter on January 2, 1996, and that he had received the letter. The postmark on the envelope is only partially legible, but the legible part clearly indicates that the letter was not mailed until February. The post office attempted delivery on February 2, 1996, and again on February 18, 1996.⁷ Thus, the postal service's notations show that Employer mailed the letter nearly a month after the date Employer alleged. Moreover, since the post office did not return the unclaimed letter to Employer until February 20, 1996, and the recruitment report was first submitted to the state employment service on February 12, 1996, Employer misrepresented that Mr. Bejarano had received the letter in its recruitment report.

Likewise, Employer's assertion that it made a follow-up inquiry on February 13, 1996 is belied by the fact that the clearly legible postmark on the follow-up letter is March 4, 1996, rather

⁶The envelopes attached to the brief were unopened when presented to the Board. The Board has opened the envelopes and confirmed that the letters contained therein were the same as those represented in the recruitment report and the rebuttal.

⁷We note that documents relating to several of the other contact letters show a lengthy gap between the date of the handwritten "postmark" date on the receipt for certified mail, and the date the letter were delivered. *See, e.g.*, AF 50A (applicant Pearson - handwritten "postmark" 1/3/96; delivery 2/2/96); AF 69A (applicant Guillen - handwritten "postmark" 1/3/96; delivery 2/6/96); AF 70A (applicant Morales - handwritten "postmark" 1/4/96; delivery 2/2/96); AF 72A (applicant Vargas - handwritten "postmark" 1/4/96; delivery 2/2/96); AF 73A (applicant Herrera - handwritten "postmark" 2/2/96; delivery 2/2/96); AF 75A (applicant Miller - handwritten "postmark" 1/4/96; delivery 2/2/96); AF 78A (applicant Santana - handwritten "postmark" 1/4/96; delivery 2/3/96); AF 81A (applicant Davis - handwritten "postmark" 1/3/96; delivery 2/2/96); AF 82A (applicant Ellis - handwritten "postmark" 1/3/96; delivery 2/2/96); AF 83A (applicant Lovett - handwritten "postmark" 1/3/96; delivery 2/illegible/96); AF 87A (applicant Chavez - handwritten "postmark" 1/26/96; delivery 3/30/96).

than February 13, 1996, as Employer's earlier submissions would lead one to believe.

Based on these circumstances, the newly submitted evidence only confirms that the CO correctly concluded that Employer failed to engage in good faith recruitment of Mr. Bejarano because of the absence of a post office stamp on the certified mail receipt.⁸ Specifically, it appears that the initial response letter to Mr. Bejarano was not actually mailed until nearly a month after the date Employer reported in all of its submissions to the state employment service and the Department of Labor. The follow-up letter is postmarked about two weeks after the date reported.

III. CONCLUSION

Based on the circumstances described above, we find that the CO's Final Determination denying labor certification must be affirmed. Furthermore, we find facial evidence of an apparently wilful misrepresentation of the date that response letters were mailed to Mr. Bejarano. The Board cannot ignore that Employer evidently stated dates for mailing of response letters in its filings with the state employment service, the CO, and in its request for review by this Board, that are inconsistent with the postmarks – and which indicate that Employer delayed the actual mailing of the letters.

IV. ORDER

IT IS ORDERED that the Certifying Officer's Final Determination denying alien labor certification is hereby **AFFIRMED**.

IT FURTHER IS ORDERED that Employer shall **SHOW CAUSE** within 10 days of the date of this order why the Board should not refer the matter of the apparent misrepresentation

⁸We observe that the record also contains other indicators of an attempt by Employer to discourage U.S. applicants. For instance, all of the initial contact letters – including those sent to Ms. Cowley and Mr. Bejarano – asked for the applicants' social security number. This is an unusual request, which in our view is *prima facie* evidence of Employer imposition of unnecessary barriers for applicants. The requirement that an employer verify authorization to work in the United States pursuant to 8 U.S.C. § 1324a cannot be used as a means during recruitment in a labor certification application to discourage applicants. *See Polysindo (USA), Inc.*, 95-INA-203 (Sept. 30, 1997)(employer not required to verify immigration status until actual hire; request for such documentation prior to job offer is obstacle to applicants that shows lack of good faith recruitment); *Percy Solotoy*, 92-INA-331 (Nov. 9, 1993). *See also Collins Foods Int'l, Inc. v. U.S. I.N.S.*, 948 F.2d 549 (9th Cir. 1991); 8 C.F.R. § 274a.2 (verification not required until time of hire).

of the dates of mailing of response letters to the Immigration and Naturalization Service for further investigation.⁹

JOHN M. VITTON
Chief Administrative Law Judge

JMV/trs

Administrative Law Judge Lawson dissenting

The majority finds that the grounds for denying certification with respect to one applicant “is off the point” and then proceeds to delve into the record to explore and predicate denial upon credibility issues not raised in either the FD or the NOF. It is well established that a new issue not raised in the NOF may not properly be raised at the FD level. *Shaw’s Crab House*, 87-INA-714 (Sept. 30, 1988), *Jose Eber*, 88-INA-100 (Oct. 3, 1989), and *Tarmac Roadstone*, 87-INA-701 (Jan. 4, 1989). This principle is one of fundamental fairness and due process which should be observed at the Board level as well. Of 40 applicants for the position, employer satisfied the CO as to the reasons for rejecting 38, with only the applicants Kim Cowley and Cel Bejarano cited for failure of proof of employer’s January 2, 1996 letters to these applicants by producing return receipts for certified mail. The request for review points out (AF 1) that the FD erred in failing to recognize that Cowley was contacted in January and February 1996 (AF 6,111) and employer’s April 14, 1997 brief attaches return receipts for January 2 and February 13, 1996 letters to Cowley, as well as 2 envelopes for 2 certified mail letters to Bejarano returned “unclaimed” in February and March 1996 discovered by employer “through a more thorough search”. While ordinarily evidence first submitted after the FD is not considered, in this instance there was a large volume of paperwork involved in tracking the 40 applicants which may account for oversight and such documents tend to confirm employer’s other evidence of mailing and contact with Cowley and Bejarano. (AF 51, 112) These matters should be addressed on remand together with the credibility issues and discrepancies discussed by the majority so that the employer may have opportunity to respond and have these matters addressed by the CO as appears to be appropriate under Section 656.31(a) cited at footnote 8 of the majority decision.

⁹*Compare* § 656.31(a), which provides that “If possible fraud or willful misrepresentation involving a labor certification is discovered prior to a final labor certification determination, the Certifying Officer shall refer the matter to the INS for investigation, shall notify the employer in writing, and shall send a copy of the notification to the alien, and to the Department of Labor’s Office of Inspector General. If 90 days pass without the filing of a criminal indictment or information, the Certifying Officer shall continue to process the application.”

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.